

# The ECtHR and Post-coup Turkey: Losing Ground or Losing Credibility?

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Leighann Spencer Di 17 Jul 2018

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Since Turkey's coup attempt in July 2016, human rights violations have been abundant. 170,599 people have been dismissed from their jobs, and thousands of educational facilities and hundreds of NGOs and media outlets shut down. 140,452 people have been detained in appalling conditions on 'terrorist' charges, and 79,774 arrested. Those persecuted include journalists, human rights defenders, civil servants, judges and prosecutors. With a broken Turkish justice system, the ECtHR has received over 33,000 applications from the country, with 30 to 40 more incoming each week. Shockingly, more than 90% of these applications have been dismissed. This is often on dubious grounds, causing experts and Turkish citizens alike to condemn its response.

On the 25<sup>th</sup> May, Spokesperson of the CoE Secretary General Daniel Holtgen declared that such criticism is "ill-informed and counterproductive". Backlash rightly ensued. By the 13<sup>th</sup> of June, Holtgen and the CoE Director General for Human Rights Christos Giakoumopoulos met with the Turkish Media and Law Studies Association (MLSA) Director Evin Altıntaş and General Coordinator Veysel Ok to discuss the situation. Both the CoE and MLSA subsequently released statements. As someone who has previously written about the inadequacies of the ECtHR vis a vis Turkey, I review these criticisms, statements, and what should be done next.

## Criticisms

The most vital and highly criticised post-coup decision taken by the ECtHR is the Köksal v. Turkey decision. Teacher Gökhan Köksal was dismissed from his job; dismissals have accounted for over 90% of ECtHR applications. Köksal's case was rejected on the basis that he must first apply to the Turkish State of Emergency Commission, i.e., exhaust all domestic avenues. This Commission was formed in January 2017 – notably via CoE recommendation – for appeals against dismissals and closures. Despite being ruled a viable domestic avenue, it is inefficient and non-impartial. Out of 21,500 cases finalised, the Commission has only approved 1,300. This is a minuscule 6% success rate. And then there is 85,500 cases still under examination. Yet Köksal v. Turkey set a precedent for countless of further ECtHR applications to be rejected. Some, like in the case of Feza Publications, were rejected on this ground despite the applicants not being entitled to apply to the Commission.

Aside from applications rejected in reference to Köksal v. Turkey, there are other instances of the ECtHR failing to provide justice for post-coup victims. Ayhan Bora, a judge who was arrested and kept in pre-trial solitary confinement without justification, applied under Article 3 of the European Convention on Human Rights. This prohibits torture and inhuman or degrading treatment, which can include solitary confinement based on factors like severity, duration and purpose. Despite Bora's treatment being severe, lengthy, aimless, and illegal

under Turkish domestic law – which stipulates only those sentenced for being a member of a terrorist organisation and posing concrete danger can be kept in solitary confinement – the ECtHR decided that Article 3 had not been violated. The ill-treatment continued until Bora was acquitted in early 2018 due to lack of evidence.

The Bora v. Turkey decision is simply one of many disappointing rulings which have signalled to Turkish authorities that violating human rights goes unpunished. Moreover, it has been noted by the likes of politicians, lawyers, academics and human rights defenders such as from Human Rights Watch that the ECtHR acts selectively. In April this year the ECtHR ruled in favour of journalist Şahin Alpay; a win for Turkish victims, but nonetheless, fellow journalists in similar situations but who could not garner international attention have had their applications rejected. And HDP politician Selahattin Demirtas, held in pre-trial detention, applied to the ECtHR before Alpay but has not yet received a ruling. This is notwithstanding that both journalists and parliamentarians are to be given priority processing. This is even more ridiculous considering Demirtas was a presidential candidate in the recent June election and had to campaign from his cell.

On another note in respect to the Alpay decision; it ruled the Turkish Constitutional Court as a viable domestic avenue. Granted that the State of Emergency Commission is a larger concern, people have pointed to the fact that even the traditional judicial system should not be considered effective. Since the coup-attempt, 4,463 judges and prosecutors have been dismissed. Many have been detained, including two Constitutional Court judges. The judicial system is, undoubtedly, no longer impartial or independent. Successful rulings are not even abided by. In the case of Alpay, the Constitutional Court ruled for his release in January, but lower assize courts refused. Just days before the ECtHR decision, the Constitutional Court again ruled for his release. This time the lower courts complied, paving the way for the ECtHR to see it as effective.

## CoE Response

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Daniel Holtgen's response to these criticisms was highly controversial. Despite being evidence-based and coming from countless people, he called them “ill-informed and counterproductive”. He added that “the EC[t]HR will not be pressurised by anyone”. After he was castigated for this, Holtgen promised further explanation. Three weeks later, he met with the MLSA representatives.

The CoE then released a statement, saying it “is aware of a common perception among NGOs that the ECtHR is not giving adequate attention to human rights issues in Turkey, but believes this is based on a lack of information and misconceptions”. The majority of the statement then goes on to reiterate that they reserve the right to reject applications which have yet to exhaust domestic avenues, i.e. the State of Emergency Commission and the Turkish Constitutional Court. This is despite simultaneously noting the extent of judges detained, and that the Constitutional Court has dismissed 5,000 detention cases of civil servants and magistrates and 75,000 out of 80,000 cases overall. The role of the courts is further important as rulings by the Commission are subject to judicial review. Essentially, it can take a decade or more to exhaust domestic avenues which have thus far proved to be non-impartial and inefficient.

In addition, the CoE statement references Şahin Alpay's case; "the decisions of the assize courts raised serious doubts about the effectiveness of the remedy". Why then is the judicial system still considered viable? The positive aspect is it does say that the status of being a viable domestic avenue can be reviewed in the future. Nonetheless, there are important questions as to how and when this could occur. It also appears encouraging that the ECtHR is focusing on applicants subjected to pre-trial detention; yet the representatives do not address the criticism that such applicants are waiting for impossible amounts of time before seeing justice from the ECtHR.

## MLSA Response

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The MLSA too put forward a statement following the meeting. They comment on pre-trial detainees' applications: "The ECtHR had taken approximately 18 months to review and finally issue a ruling in the cases of two journalists whose applications had been granted priority; a duration too lengthy at a time when Turkish courts are rapidly handing out sentences. [In one example,] The court issued a ruling finding the detention of Altan unlawful, but it came after he was given a life sentence for attempting to overthrow the constitutional order. It was too late." Altan's ECtHR ruling came at the same time as Alpay's, similarly after the Constitutional Court ruled his pre-trial detention unlawful. But having been sentenced before the ECtHR verdict, he was not released until months later, after this meeting took place. His conviction is still subject to appeal.

The MLSA representatives also bought up the issue of viable domestic avenues. Their statement provides more substantial insight into CoE views on the State of Emergency Commission. Director General Giakoumopoulos justified the Commission in terms of the right to access legal review, saying that any ECtHR ruling would have only set up a similar remedy. He also said that the ECtHR cannot rule on dismissals because access to jobs is not a fundamental human right. However, aside from the Commission hardly being viable legal review, the loss of a job is not the end of the line for these applicants. Dismissal leads to further persecution, such as passports cancelled, children removed, discrimination in all sectors of society, and even used as evidence for detention. With media workers, a dismissal gives way to a violation of freedom of expression. In respect to the Constitutional Court, the MLSA observed similar reasoning to what I have stated, concluding that it is hard to understand how it can still be considered an effective remedy. In fact, the representatives stated that they agree with much of the criticism towards the ECtHR.

## What Now?

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Overall, the meeting is cause for optimism in light of CoE representatives consulting NGO members who have been involved in Turkish applications to the ECtHR and are well-versed on its failures. The statements do provide some insight, but leave plenty to be addressed. In moving forward, the CoE must reconsider the criteria of a viable domestic avenue; at the very least, explain the circumstances in which the State of Emergency Commission and Constitutional Court could be reevaluated. Addressing concerns over individual cases would also serve them well. For instance, the Feza rejection, the Bora decision, and why Selahattin Demirtas' application has yet to be ruled on.

Further communication is of the utmost importance. Many people wish to see an open event to discuss the CoE's position. As Turkish human rights violations continue on a massive scale, with no sign of stopping now that Erdogan has been re-elected, there is no doubt that the ECtHR will continue to receive both applications and criticism. It should be noted that with the influx of Turkish applications post-coup – which as the CoE notes, is unprecedented – the process must be streamlined. Nonetheless, each application represents a human life, and gross human rights violations that must be treated accordingly. Despite the necessity of remaining neutral in political situations, such a blatant crackdown needs to be confronted by the ECtHR. Otherwise, it risks that very criticism of acting politically, but in favour of the offending government.

As the MLSA points out, “The ECtHR is being discussed publicly to an extent that has never happened until now. This involves a particular danger. Although we understand the court's adamantness on protecting its credibility before the Turkish state, we also think it is more important that the court maintains its reputation in the eyes of civil society and the peoples of Turkey”.

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